In the Court of Appeals of the State of Alaska

Raymond C Katchatag, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-13311** **Order to Show Cause** Date of Order: **4/25/2022**

Trial Court Case No. **3AN-16-09226CI, 3AN-05-06255CR**

Before: Allard, Chief Judge, Wollenberg and Harbison, Judges.

Raymond C. Katchatag appeals the dismissal of his application for post-conviction relief. In his *pro se* application, Katchatag alleged that his trial attorney provided ineffective assistance of counsel and that newly discovered evidence required the court to vacate his conviction for second-degree theft. The State moved to dismiss the application because it was not accompanied by any affidavits.[1]

Attorney Fleur L. Roberts was appointed to represent Katchatag on his application. Despite the clear dictates of Alaska Criminal Rule 35.1(e)(2) — which requires appointed counsel to follow one of three procedures in a post-conviction relief case — and despite multiple notices from the superior court instructing Roberts to take some action or respond to the State's motion to dismiss, Roberts repeatedly failed to take any action. In addition, although the State had not contested the timeliness of Katchatag's application, Roberts herself insisted that the court issue a ruling on timeliness.

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[1] *See* Alaska R. Crim. P. 35.1(d) ("Affidavits, records, or other evidence supporting [the] allegations [in an application for post-conviction relief] shall be attached to the application or the application shall recite why they are not attached.").

Even once the court did so, stating that Katchatag's application was "accepted for consideration," Roberts did not file a response to the State's motion to dismiss or an amended application for post-conviction relief. Given Roberts's inaction, the superior court ultimately dismissed Katchatag's application as deficient. Roberts then requested relief from the court's order, indicating that she wished to rely on Katchatag's own *pro se* application, but the court refused to set aside its dismissal.

On appeal, Katchatag is again represented by attorney Fleur L. Roberts. But given what transpired in the superior court, Roberts is left to advance only meritless arguments that the superior court erred in dismissing Katchatag's application.

First, Roberts claims that the superior court should not have ruled on the State's motion to dismiss because the motion itself was filed before the superior court formally accepted Katchatag's application as timely. But, as we already noted, the State never alleged that the application was untimely. And, in any event, the superior court issued a written order (at Roberts's request) specifically addressing the timeliness issue and accepting Katchatag's application. This order was issued nearly eight months before the court dismissed the application. But Roberts did not file an amended application or otherwise correct the deficiencies identified by the State — despite the superior court's repeated orders that she do so.

Second, Roberts argues that, because the superior court never issued a notice that she was appointed to represent Katchatag on the merits of his claim under Criminal Rule 35.1(e)(2), she was never afforded an opportunity to file either an amended application or a notice that she intended to proceed on Katchatag's original *pro se* application. Accordingly, Roberts argues that the superior court should not have entertained the State's motion to dismiss nor required her to correct the deficiencies in

Katchatag's *pro se* application, but instead should have permitted her to proceed on the (deficient) *pro se* application.

But Criminal Rule 35.1(e)(2) itself identifies the duties of appointed counsel in a post-conviction relief case and explicitly states that counsel may file an amended application or proceed on the *pro se* application. Moreover, the record is clear that the superior court issued repeated notices instructing Katchatag's attorney to comply with Criminal Rule 35.1(e)(2). Despite having ample time to do so and clear notice of her obligations under the rule, Roberts took no steps to amend Katchatag's application or to fulfill the requirements of Criminal Rule 35.1(e)(2). Instead, after the superior court dismissed Katchatag's application, Roberts requested relief so that she could proceed on Katchatag's facially deficient *pro se* application.

We conclude that the issues Roberts raises are meritless; in fact, they are frivolous. But they are frivolous precisely because of Roberts's deficient representation in the superior court. We are troubled by Roberts's continued representation of Katchatag on appeal, since it appears that her own acts or omissions led directly to the superior court's dismissal of Katchtag's application.

An attorney has a personal conflict of interest when there is a significant risk that their representation will be materially limited by their own personal interest.[2] Here, Roberts is materially limited in her ability to represent Katchatag's interests on appeal because to do so effectively, she seemingly needs to attack her own actions in the superior court.[3] But to do so would pit Katchatag's interests against her own interest in

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[2] *See* Alaska R. Prof. Conduct 1.7(a)(2).

[3] *See, e.g.*, *Demoski v. State*, 449 P.3d 348, 351 (Alaska App. 2019) (holding that a remand was required where the post-conviction relief attorney in the superior court filed an

protecting her professional reputation.[4]

Because we have significant reservations as to whether Katchatag has received conflict-free and competent counsel on appeal, we wish to solicit responses to this order by the parties. To the extent we conclude that Roberts has a conflict of interest in representing Katchatag on appeal, our intent is to vacate Roberts's appointment and the prior briefing in this case, and order the Office of Public Advocacy to assign a new attorney to Katchatag for the purposes of appealing the superior court's dismissal of Katchatag's post-conviction relief application.

Accordingly, IT IS ORDERED:

1. On or before **May 24, 2022**, Fleur L. Roberts shall show cause why she does not have a conflict in representing Katchatag in this appeal.

2. After Ms. Roberts files her pleading, the State shall have 30 days to respond.

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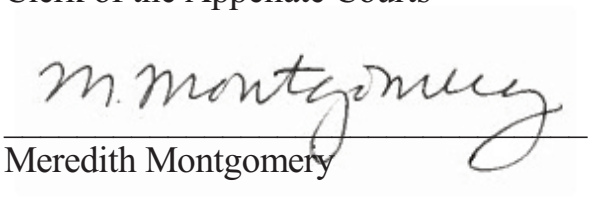
amended application that was facially defective and then offered no substantive response to this concern when raised in the State's motion to dismiss); *Tazruk v. State*, 67 P.3d 687, 690-92 (Alaska App. 2003) (holding that a remand was required because it was impossible to determine whether post-conviction relief counsel had provided constitutionally adequate representation in the superior court where the attorney elected to proceed on Tazruk's *pro se* application, which only contained claims that were facially meritless or facially inadequate).

[4] *See Christeson v. Roper*, 574 U.S. 373, 378 (2015) (citing *Maples v. Thomas*, 565 U.S. 266, 285 n.8 (2012)) (recognizing that a significant conflict of interest arises when an attorney's interest in avoiding damages to their own reputation is at odds with the client's strongest argument).

3. Upon receipt of these pleadings, we will resume our consideration of this issue.

Entered at the direction of the Court.

Clerk of the Appellate Courts



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